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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA

7
8 SHAWNDRAY STAR BOODE, No. C-13-2438 EMC (pr)
9 Petitioner,

10 v. D. K. JOHNSON, Warden,
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12 Respondent.

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15 ORDER DENYING PETITION FOR
16 WRIT OF HABEAS CORPUS

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19 I. INTRODUCTION

20 Shawndra Star Boode filed this *pro se* action for a writ of habeas corpus under 28 U.S.C. §
21 2254. The Court issued an order to show cause why the writ should not be granted as to four claims
22 asserted in the petition. Respondent has filed an answer and Ms. Boode has filed a traverse. For the
23 reasons explained below, the petition will be **DENIED**.

24 II. BACKGROUND

25 A. The Crimes

26 The California Court of Appeal described the events that led to Ms. Boode's conviction for
27 murder and other crimes.

28 The prosecution's theory of the case was that on or about January 17, 2004, appellants shot
and killed David and Catherine Brooks (Dave and Cathy), with whom they were acquainted,
in order to steal approximately \$380,000 Dave had recently received in settlement for an
on-the-job injury. The victims rented out rooms in their Hayward, California home to help
with the rent. Boode rented a room from the couple. The victims told many people,
including Boode, that they were expecting to receive a large sum of money. Each victim
died from a gunshot wound to the head at close range.

1 Two of the prosecution's chief witnesses, Peter Elisary and Jeffery DeTar, each played a role
2 in the murders and testified under grants of immunity.

3 Peter Elisary knew Rodriguez growing up and knew that he was one of the leaders of a
4 criminal street gang. Elisary met Boode, who was also gang affiliated, in January 2004 while
5 taking drugs with other people. At one time, he had a sexual relationship with her.

6 Boode told Elisary that Dave and Cathy were receiving a settlement check and that she
7 planned to rob them. Elisary initially refused Boode's invitation to participate in the
8 robbery, but he eventually relented because he had "feelings for her." Boode also asked
9 Rodriguez to participate in the robbery. It was agreed that Rodriguez would be "the muscle"
10 or the "enforcer, to handle everything."

11 On the night of the murders, Elisary and appellants ingested methamphetamine and discussed
12 the robbery for about an hour. At about "two, three, four in the morning," appellants,
13 accompanied by Elisary, set out to commit the robbery. Elisary drove a white Camaro,
14 which was borrowed from Rodriguez's sister. Boode was armed with a .357 revolver.
15 Elisary parked the Camaro on a side street, out of sight from Dave and Cathy's residence.
16 Appellants both got out of the Camaro and walked toward the residence while Elisary waited
17 in the car.

18 Ten to fifteen minutes later, appellants "speedwalk[ed]" back to the Camaro and got into the
19 car. Rodriguez appeared "[n]ervous" and Boode appeared "nervous and scared." Elisary
20 drove the Camaro back to Rodriguez's residence. Boode immediately took a shower and
21 Rodriguez showered next.

22 Boode described the murder to Elisary. Boode said she demanded money from Dave and
23 then "she shot Dave in the back." She then heard a noise in the kitchen, turned and saw
24 Cathy, chased Cathy into the bedroom, and "just shot her" in the "neck or facial area." Later,
25 Rodriguez recounted his version of events to Elisary. Rodriguez stated he "went behind
26 Dave and was choking Dave" with a string or cord. Rodriguez let Dave go, and Dave tried to
27 attack Rodriguez. In an attempt to "make it look like a murder-suicide," Rodriguez took the
28 .357 revolver, cleaned it, and "put it in Cathy's hand and took a spent casing and put it on her
hand."

Jeffery DeTar also had a role in the murders and testified at trial under a grant of immunity.
During the relevant timeframe, he rented a room from Dave and Cathy in their residence.
DeTar testified that Boode was present when Dave discussed the large disability settlement
check he was expecting to receive. When the certified letter addressed to Dave arrived on
January 14, 2004, DeTar answered the door and signed for it. Dave opened the letter and
saw two checks. He then put the checks into a desk drawer. The next day, DeTar drove
Dave to a liquor store to cash one check for \$15,073. DeTar drove Dave and Cathy to stores
to buy clothes, cell phones, and video games.

Boode said she wanted to take the couple's money. DeTar agreed to assist Boode, who he
was trying to impress, by alerting her when the couple was home alone. Nonetheless, DeTar
warned the couple that Boode and Elisary planned to rob them but they just "blew it off that
they wouldn't do it."

On Saturday, January 17, 2004, the couple returned from another shopping spree, and DeTar
helped them unload. Thereafter, DeTar called Boode on her cell phone to report that the
couple had arrived home and that DeTar planned to leave.

1 Later, DeTar took a telephone call from Boode, who said, “I got that bitch.” DeTar also
2 received four to five text messages from Boode. One text message received from Boode
3 stated “777,” referencing a jackpot.

4 When they were face-to-face, Boode reported to DeTar “[t]hat she had had a wrestling match
5 with Cathy in the hallway and that she had gotten her, that she had got her in the bedroom.”
6 Boode said that Dave “had been shot also.” She explained “[t]hey didn’t want anybody to be
7 able to I.D. anybody.” Boode claimed they had found a check for \$500,000.

8 After speaking with Boode, DeTar went to Dave and Cathy’s residence and knocked on the
9 door, but received no response. DeTar looked through the window of Dave and Cathy’s
10 bedroom and saw “blood and stuff on the wall” and a body “in between the dresser and the
11 bed.” Later, when the police were conducting an investigation, Boode instructed DeTar to
12 tell police that there was a fight between Cathy and Dave, that Dave hit Cathy, and “it looked
13 like a murder-suicide type thing.”

14 At trial, Rodriguez’s sister, Ana Rodriguez, claimed not to remember key portions of her
15 out-of-court statement given to police about the murders. Specifically, Ana testified that she
16 did not recall telling Sergeant Mark Stuart, the lead investigator in the case, that: (1) on the
17 night of the murders, appellants and Elisary left in the white Camaro after Ana loaned them
18 the car; (2) she saw Boode with a black gun; (3) she observed appellants and Elisary return in
19 the white Camaro in the early morning hours of January 17, 2004; (4) after they returned, she
20 observed Boode take her clothes off and put them into a garbage bag; (5) her brother,
21 Rodriguez, told her that he was the lookout, that the victims were awake, that things got out
22 of hand, and that the victims were screaming; (6) Boode showed her a check for over
23 \$200,000; and that (7) Rodriguez tore up the check after Ana told him it was no good and
24 that he should get rid of it.

25 The prosecution presented physical evidence that when the coroner’s office moved Dave’s
26 body, they found a white telephone cord under his head and a black wool cap under his body.
27 The knit cap yielded a “mixed DNA profile,” which meant that the DNA from multiple
28 contributors was found on the cap. Rodriguez could not be excluded as a possible
29 contributor to the DNA profile from the knit cap.

30 Neither appellant testified at trial. In appellants’ defense, they argued that the prosecution
31 witnesses had made numerous conflicting statements about the events in question, and could
32 not be trusted to give reliable testimony. They characterized the prosecution’s chief
33 witnesses as longstanding methamphetamine users, whose testimony should be viewed as
34 unreliable, self-interested, and otherwise untrustworthy. To support that theory, the defense
35 presented the expert testimony of Dr. Stephen Pittel, a forensic psychologist, regarding the
36 effects of methamphetamine abuse on a person’s memory, perception, and general reliability.
37 Dr. Pittel testified that long-term users of methamphetamine are “very, very unreliable in
38 their memories because of the effect of the drug.” He explained “their attention is wandering
39 all over the place and they’re constantly seeing and hearing things that other people aren’t
40 seeing and hearing.”

41 Resp. Ex. A, California Court of Appeal Opinion (“Cal. Ct. App. Opinion”), ¶. 2-5.

42 B. Procedural History

43 A jury trial was held for Ms. Boode and Mr. Rodriguez in Alameda County Superior Court in
44 2010. Following the jury trial, Ms. Boode and Mr. Rodriguez were convicted of two counts of first
45 degree murder. The jury also found true for both defendants the allegations of special circumstances

1 of murder committed in the course of a robbery and with multiple victims, which elevated both
2 counts to special circumstances murder for sentencing purposes. The jury also found true the
3 allegations that Ms. Boode personally used a firearm in the commission of the murders, personally
4 and intentionally discharged a firearm and caused great bodily injury on another person. Ms. Boode
5 was sentenced to 120 years to life plus life in prison without the possibility of parole.

6 Ms. Boode appealed. The California Court of Appeal affirmed the judgment of conviction.

7 *See* Resp. Ex. B. The California Supreme Court denied Ms. Boode's petition for review. *See id.*

8 Ms. Boode then filed this action. Her petition asserts four claims for federal habeas relief.

9 **III. JURISDICTION AND VENUE**

10 This Court has subject matter jurisdiction over this habeas action for relief under 28 U.S.C.
11 § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the petition concerns the
12 conviction and sentence of a person convicted in Alameda County, California, which is within this
13 judicial district. 28 U.S.C. §§ 84, 2241(d).

14 **IV. STANDARD OF REVIEW**

15 This Court may entertain a petition for writ of habeas corpus "in behalf of a person in
16 custody pursuant to the judgment of a State court only on the ground that he is in custody in
17 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

18 The Antiterrorism And Effective Death Penalty Act of 1996 ("AEDPA") amended § 2254 to
19 impose new restrictions on federal habeas review. A petition may not be granted with respect to any
20 claim that was adjudicated on the merits in state court unless the state court's adjudication of the
21 claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of,
22 clearly established Federal law, as determined by the Supreme Court of the United States; or
23 (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the
24 evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

25 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court
26 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the
27 state court decides a case differently than [the] Court has on a set of materially indistinguishable
28 facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

1 “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the
2 state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but
3 unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[A] federal
4 habeas court may not issue the writ simply because that court concludes in its independent judgment
5 that the relevant state-court decision applied clearly established federal law erroneously or
6 incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. “A federal habeas court
7 making the ‘unreasonable application’ inquiry should ask whether the state court’s application of
8 clearly established federal law was ‘objectively unreasonable.’” *Id.* at 409.

V. DISCUSSION

10 A. Claim 1: Failure To Grant Requested Continuance

11 Ms. Boode’s first claim concerns the trial courts’ refusal to grant her motion for a
12 continuance so that her new attorney could have more time to prepare for trial. In her original
13 federal habeas petition, Ms. Boode identified this as a claim for “ineffective assistance of counsel.”
14 In her traverse, she identified this as a claim for a violation of her Sixth Amendment right to
15 effective assistance of counsel and her Fourteenth Amendment right to due process. *Compare*
16 Docket # 1 at 7 *with* Docket # 15 at 3, 9. In the California Supreme Court, however, she had
17 identified the claim as one for a violation of her Fourteenth Amendment right to due process and had
18 conceded that “counsel’s eventual performance did not rise to the very high level of constitutionally
19 ‘ineffective’ counsel set by *Strickland v. Washington*,” 466 U.S. 668 (1984). *See* Resp. Ex. B,
20 Petition For Review, pp. 6, 12.

21 || 1. Factual Background

22 On October 20, 2009, Deborah Levy substituted in as counsel for Ms. Boode.¹ The judge
23 promptly focused on trial preparation, as the codefendant was no longer waiving time on his right to
24 a speedy trial. Ms. Levy stated that she had “a very small part of the discovery” from Ms. Boode.

26 ¹ The record does not disclose why Mr. Giller, the attorney who had represented Ms. Boode
27 for more than two years and throughout the lengthy preliminary examination, withdrew from the
28 case that day. Mr. Giller apparently had done substantial work in the case, as evidenced by his
lengthy analysis of the case in his May 27, 2009 6-page letter to the district attorney requesting that
the death penalty be dropped as a potential penalty in the case. *See* CT 1658-1663.

1 Resp. Ex. C at RT 2. Ms. Boode's former counsel (Mr. Giller) promised to deliver three boxes of
2 discovery in four days and counsel for Mr. Rodriguez (Mr. Thews) promised to lend to Ms. Levy
3 two binders containing the police reports the next morning so she could begin preparing her case.
4 Although there were duplicate documents in the files, Mr. Giller estimated he had about three boxes
5 of material, Mr. Thews estimated he had two boxes "and a couple of overflows," and the prosecutor
6 said he had about six boxes of materials, including one or two boxes of transcripts. *See* Resp. Ex. C
7 at 1-5. The court asked how long Ms. Levy thought she would need to get through the materials for
8 a first time, and Ms. Levy estimated it would be three to four weeks. The court said he wanted to
9 have another hearing in two weeks, on November 4, "and we'll see how far away from a trial we
10 are." *Id.* at RT 5. The court made findings that there was good cause to go beyond the sixtieth day
11 of speedy trial time based on the substitution of counsel and the volume of material in the file.²

12 On November 4, 2009, the court again made a finding of good cause to go beyond the
13 statutory speedy trial time limits, set a hearing on December 3 "for informal readiness," and said that
14 there would be a courtroom available for the trial to start on December 7. *Id.* at RT 6.

15 On December 3, 2009, Ms. Levy filed a motion for a continuance of the trial for an unstated
16 amount of time because she needed additional time to prepare. Ms. Levy described the case as
17 having a 500-page police report, 25 preliminary hearing transcripts, approximately 7,000 pages of
18 discovery (including transcripts of statements of at least twenty witnesses), approximately 25
19 videotapes of statements, and approximately 30 audiotapes of statements. CT 1448. In her
20 declaration in support of the motion, Ms. Levy stated that she knew when she was appointed on
21 October 20 that "it was a case with enormous discovery" and that the codefendant was not waiving
22 his speedy trial time. "In good faith, I told Judge Morrison that I could be ready for a trial on 12/7.
23 At this point that is just impossible." CT 1447.

24 On December 7, 2009, to deal with the speedy trial and the continuance issues, the court
25 (with both codefendants' consent) sent the case to "Department 7" (apparently a department in the
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27 ² Ms. Boode does not assert any speedy trial claim. The speedy trial facts were more of a
28 concern for her codefendant but are mentioned here because they influenced the superior court's
responses to Ms. Boode's requests for additional time to prepare.

1 court in which trials were held) so the parties could stipulate that trial had commenced, with the
2 expectation that pretrial motions and jury selection would start sometime after January 4, 2010.
3 Resp. Ex. C at RT 7-9. The presiding judge denied Ms. Levy's motion for a continuance. The
4 presiding judge stated that he was aware this was "a voluminous case" and that Ms. Levy had been
5 "working diligently on it" for a two-month period, and his plan gave Ms. Levy "approximately
6 another four weeks to be ready to begin in earnest." *Id.* at RT 8.

7 The parties went to Department 7 later on December 7, 2009, and stipulated that the jury trial
8 had commenced that day. The trial court stated that the parties would later meet to discuss the juror
9 questionnaire and discuss motions. The court also stated that on January 4, 2010, the parties would
10 finalize the questionnaire and all the motions should be filed. The court stated that the parties would
11 argue the motions on January 11, 2010, and the jury panels would report on January 19 and 21. The
12 court hoped that a jury would be empaneled by January 26 and opening statements could commence
13 on January 26 or 27, 2010. Ms. Levy said she was "agreeable" with the proposed schedule, although
14 it had been a large file to review. RT at 4-5.

15 Thereafter, there were several more court sessions and adjustments to the schedule for jury
16 selection, motions in limine and trial; most of these adjustments were made at Ms. Levy's request
17 because she needed additional time to prepare. *See* RT at 9-22, 64, 67, 119, 121. At one session (on
18 December 15, 2009), the court expressed concern about getting a jury if there was a two-week delay
19 between the day on which jurors would be summoned to appear and the day on which voir dire
20 would begin. *See* RT 17-18. At another session (on January 4, 2010), the judge mentioned that he
21 wanted to get the proceedings moving because delaying trial would increase the chance that another
22 case would get sent to the department for trial and bump this case. *See* RT 64. Also at that January
23 4, 2010 session, the prosecutor requested that the court set a specific date that trial would start
24 because he needed to subpoena witnesses – "exactly," responded the court – and airline flight
25 arrangements needed to be made for some of the witnesses. RT 24. At yet another session (on
26 January 12, 2010), when Ms. Levy again complained about the schedule and that she was "in a
27 mess," the court responded that, back in December, "I told you I would be lenient, but, you know,
28 two months is a little more lenient than what I planned to be." RT 120-21. At another session (on

1 January 26, 2010), when Ms. Levy asked for more time to deal with the jury questionnaires, the
2 court said picking the jury would take time, and “if we keep putting it back, we’re going to run into
3 the other time problems,” apparently referring to the possibility of losing jurors and Ms. Levy’s
4 preplanned vacation scheduled for the end of March. RT 253.

5 Eventually, pretrial motions were argued and decided on January 19, 21, 25 and 26, 2010.
6 Voir dire of the jurors occurred on February 1, 2, 8, 9, and 10, 2010. The jury was sworn in on
7 February 9 and 10, 2010. On February 22, 2010, the parties made their opening statements to the
8 jury. The jury returned its verdict on April 1, 2010. RT 2160.

9 Ms. Boode filed a motion for new trial on the ground that “[c]ounsel was not able to provide
10 adequate representation due to her inability to have sufficient time to prepare for trial.” CT 1655.
11 The trial court denied the motion for new trial, observing that there had been a lengthy gap between
12 the December 7, 2009 stipulated start of trial and the commencement of testimony on February 2,
13 2010, and that there had been several breaks during trial. The trial court explained that the
14 arrangement whereby the parties stipulated that trial began on December 7, 2009, was done to give
15 Ms. Levy more time to prepare, but the judge “didn’t mean it would be continued forever.” CT
16 1668. “And the Court continued to give more time each time each of you asked for time. [¶] I think
17 during the time [the prosecutor’s] dad was sick, you took a two-week vacation, [and Mr.
18 Rodriguez’s attorney] was sick and also had a burglary in his office. We took time off in between
19 for all of those different things. [¶] And when we started, everyone seemed prepared. You didn’t
20 seem to have any trouble cross-examining the witnesses, and things moved smoothly. [¶] I know it
21 was a lot of paper, but a lot of it was repetition.” CT 1669. The trial court also noted that jurors
22 weighed the testimony of all the witnesses, including extensive impeachment evidence. CT 1669-
23 70. “Some of the witnesses corroborated each other. There was other corroborative evidence. And
24 all of these witnesses were strenuously cross-examined by you, Ms. Levy.” CT 1670.

25 2. California Court of Appeal’s Decision

26 On appeal, Ms. Boode contended that the trial court denied Ms. Levy a reasonable
27 opportunity to prepare for trial, and thereby denied her state and federal rights to due process. Ms.
28 Levy was a sole practitioner with one investigator. Ms. Boode argued that the trial judge “refused

1 to grant any outright continuances of trial, despite three separate requests for such continuances;
 2 instead, she kept adjusting the calendar for certain deadlines, and thereby parceled out to [defense
 3 counsel] in dribs and drabs, a few more days here and there for trial preparation.”” Cal. Ct. App.
 4 Opinion at 7. She urged that ““the trial court was overly concerned with keeping this trial on a
 5 preconceived schedule, without regard to whether such rigid adherence to judicial economy and
 6 expediency obviated appellant’s due process right to a fair trial, or her attorney’s ability to present
 7 an effective defense.”” *Id.*

8 The California Court of Appeal rejected Ms. Boode’s challenges, focusing mostly on state
 9 law precedents. That court determined that the denial of a continuance was ““not an arbitrary
 10 insistence on expeditiousness, but rather a reasoned assessment of the need for delaying the trial in
 11 light of the potential problems such delay might cause.”” Cal. Ct. App. Opinion at 7 (quoting *People*
 12 *v. Fuiava*, 53 Cal. 4th 622, 651 (Cal. 2012). The California Court of Appeal focused on the tension
 13 between Mr. Rodriguez’s assertion of his speedy trial rights and Ms. Boode’s desire to further delay
 14 the trial.

15 Because codefendant Rodriguez had not waived his speedy trial rights, the trial court was in
 16 a difficult quandary. Boode’s counsel successively asked for continuances to adequately
 17 investigate and prepare, often citing the large amount of discovery to be studied. In ruling on
 18 the continuance requests, the trial court was presented with two competing and conflicting
 19 constitutional interests. In addition to providing the right to a speedy trial, the Sixth
 20 Amendment provides a criminal defendant with the right to assistance of counsel. (U.S.
 21 Const., 6th Amend.; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) “It has long been
 22 recognized that the right to counsel is the right to the effective assistance of counsel.
 23 [Citations.]” (*McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14.) The trial court was
 24 aware of the nature of these conflicting rights and, although it granted counsel’s continuance
 25 requests, it did so with continuances of a shorter duration than counsel sought.FN3

26 FN3. Boode claims “severing the parties would have solved that problem.” (Fn.
 27 omitted.) However, we note that on appeal, appellant does not challenge the trial
 28 court’s denial of her motion for severance of trial from her codefendant.

29 Moreover, in addition to showing error, Boode must also demonstrate prejudice. Boode does
 30 not identify any particular meritorious defense strategies or evidentiary objections that
 31 should have been pursued, but were not, as a result of the denial of the continuance. She
 32 makes clear that she is “not arguing on direct appeal that appellant’s trial counsel was
 33 ‘ineffective.’ This appellate challenge is solely based on court error in refusing to grant that
 34 attorney’s requested continuances, which were necessary for her to prepare a defense.””
 35 (Boldface omitted.) Consequently, she merely suggests some undefined prejudice should be
 36 “presumed,” which is inconsistent with binding precedent requiring that appellant show
 37 actual prejudice. (See *People v. Zapien* (1993) 4 Cal.4th 929, 972–973 [finding no prejudice
 38 from denial of a continuance where there was no reasonable basis to conclude from the
 39 defendant’s showing that the trial court’s ruling led to a less favorable result for the

1 defendant]; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1039–1040.) For the foregoing
2 reasons, we conclude Boode has failed to establish that the trial court abused its discretion or
3 violated her constitutional rights by denying her motions for a continuance.

3 Cal. Ct. App. Opinion at 7-8.

4 3. Analysis of Federal Constitutional Claims

5 a. Due Process Claim

6 “The matter of a continuance is traditionally within the discretion of the trial judge, and it is
7 not every denial of a request for more time that violates due process even if the party fails to offer
8 evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon
9 expeditiousness in the face of a justifiable request for delay can render the right to defend with
10 counsel an empty formality. There are no mechanical tests for deciding when a denial of a
11 continuance is so arbitrary as to violate due process. The answer must be found in the circumstances
12 present in every case, particularly in the reasons presented to the trial judge at the time the request is
13 denied.” *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (citations omitted); *see also Morris v. Slappy*,
14 461 U.S. 1, 11-12 (1983) (“broad discretion must be granted trial courts on matters of continuances;
15 only an unreasoning and arbitrary ‘insistence upon expeditiousness in the face of a justifiable
16 request for delay’ violates the right to assistance of counsel”).³ Even if a continuance has been
17 denied improperly, habeas relief is not available unless there is a showing of actual prejudice to
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19 ³ In *Morris*, the requested continuance implicated the Sixth Amendment right to counsel, but
20 it is a choice-of-counsel case rather than an ineffective-assistance-of-counsel case. In *Morris*, the
21 original public defender who had represented the defendant was taken ill and another public
22 defender was assigned to represent the defendant shortly before trial was to start. At the beginning
23 of trial, the new public defender was ready to go, but the defendant asked for a continuance to give
24 the new public defender more time to prepare. The trial court denied the motion. By the third day
25 of trial, the defendant claimed that he was unrepresented at trial because his only true attorney was
26 his original public defender who had taken ill. The trial court treated the argument as a renewed
27 request for a continuance and denied it. On appeal from the denial of a petition for writ of habeas
28 corpus, the Ninth Circuit announced that the Sixth Amendment right to counsel included a right to a
“meaningful attorney-client relationship,” and that the trial court had failed to give it sufficient
weight in refusing to continue the trial to give the original public defender time to heal and return to
representing the defendant. *See Morris*, 461 U.S. at 10-11. The U.S. Supreme Court determined
that the trial court’s denial of the requested continuance at the outset of a trial “was far from an
abuse of discretion” in light of the replacement public defender’s preparation and announced
readiness to proceed, *id.* at 12, and that the trial court’s denial of the midtrial motion for a
continuance to have the original public defender return to representing defendant “was abundantly
justified,” *id.* at 13. *Morris* is best known for its strong rejection of the Ninth Circuit’s “novel idea
that the Sixth Amendment guarantees an accused a ‘meaningful attorney-client relationship.’” *Id.* at
14.

1 petitioner's defense resulting from the refusal to grant a continuance. *See Gallego v. McDaniel*, 124
2 F.3d 1065, 1072 (9th Cir. 1997).

3 *Ungar* and *Morris* provide the "clearly established Federal law" for purposes of applying §
4 2254(d)(1) to Ms. Boode's claim. "[E]valuating whether a rule application was unreasonable
5 requires considering the rule's specificity. The more general the rule, the more leeway courts have
6 in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664
7 (2004); *see, e.g., Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("The *Strickland* standard is a
8 general one, so the range of reasonable applications is substantial"). The rules stated in *Ungar* and
9 *Morris* are general rules. Thus, the § 2254(d) analysis must be done with the understanding that the
10 California court has more leeway in deciding whether the denial of the continuance violated Ms.
11 Boode's federal constitutional rights.

12 The California Court of Appeal's rejection of Ms. Boode's due process claim was not
13 contrary to or an unreasonable application of the very general rules in *Ungar* and *Morris*. Ms.
14 Boode's case was not a case of a judge with a "myopic insistence upon expeditiousness in the face
15 of a justifiable request for delay." *Ungar*, 376 U.S. at 589. The superior court denied Ms. Boode's
16 request for a continuance, but made several adjustments to the schedule mostly at Ms. Levy's
17 request. As a result of the scheduling and adjustment decisions, Ms. Levy had more than four
18 months to prepare the defense before she gave her opening statement. Even with the allegedly
19 voluminous materials – perhaps 7,000 pages of documents and some tapes – the state appellate court
20 could have reasonably concluded that four months was sufficient time to prepare a defense. Ms.
21 Levy never provided any more specific reason for a continuance than that she was having difficulty
22 reviewing the substantial documents, e.g., there was no missing witness or elusive expert being
23 sought. When Ms. Levy first took the case in October 2009, she knew that the documents were
24 voluminous and said then she thought she could make at least a first read-through of the materials in
25 3-4 weeks. Ms. Boode does not explain in any detail why Ms. Levy was unable to be prepared for a
26 trial in which testimony did not start until four months after she was appointed. Ms. Boode also
27 does not demonstrate that the work done by Ms. Levy's predecessor was unusable by Ms. Levy.

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1 While she may have entered a case with thousands of pages of documents, she also entered a case in
2 which her client had been represented by another attorney for at least two years.

3 Ms. Boode faults the trial court for giving extensions of time in “dribbles and drabs,” but that
4 argument is unpersuasive. First, the argument ignores that, before mid-January 2010, Ms. Levy had
5 two large blocks of time to prepare: she had almost seven weeks (i.e., from October 20, 2009
6 through December 7, 2009) from the day she was appointed until the intended start of trial on
7 December 7; and she had another six weeks (i.e., from December 7, 2009 through January 19, 2010)
8 from the day of the stipulated start of trial until the jury was scheduled to report for duty on January
9 19, 2010. Thereafter, the court pushed back various dates mostly to accommodate Ms. Levy’s
10 claimed need to do further preparation; even if those were short extensions, Ms. Levy could have
11 done more work with each short extension of time she received. Also, the court’s normal trial
12 schedule allowed for further preparation during the trial, as the presentation of evidence to the jury
13 was anticipated to take only five hours per day on any trial day. *See* RT 272 (jury will be told the
14 normal schedule for trial is from 9:30 a.m. to 12:00 p.m. and 2:00 p.m. to 4:30 p.m. Monday through
15 Thursday of each week, with Fridays and several additional days off).

16 The California Court of Appeal’s rejection of Ms. Boode’s due process claim was not an
17 unreasonable application of *Ungar* or *Morris*. Ms. Levy had entered the case rather late and asked
18 for a continuance rather quickly, so it cannot be said she was just trying to avoid trial at the last
19 minute. However, unlike the usual situation, there was a codefendant here asserting his
20 constitutional right to a speedy trial. That codefendant’s assertion of his constitutional right could
21 not be ignored as the trial court considered Ms. Boode’s request for a continuance. A severance did
22 not appear a good option, even if requested, because there is a state statutory policy favoring joint
23 trials of jointly charged codefendants, *see* Cal. Penal Code § 1098, and these two codefendants were
24 thought to have acted very much together in the crimes, e.g., Ms. Boode shot one victim when the
25 victim broke free from Mr. Rodriguez’s efforts to strangle him. If separate trials were held, there
26 would have been a duplication of a great deal of effort. *See Morris*, 461 U.S. at 15 (“The spectacle
27 of repeated trials to establish the truth about a single criminal episode inevitably places burdens on
28 the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial

1 resources"). The trial court had carefully considered the competing interests – of Ms. Boode's
2 counsel's desire to obtain additional time to prepare for trial and of Mr. Rodriguez's speedy trial
3 rights – when it denied the requested continuance. The state appellate court could reasonably have
4 concluded that this was not the sort of "myopic insistence upon expeditiousness in the face of a
5 justifiable request for delay" that *Ungar* prohibits. The state appellate court also reasonably could
6 have concluded that the trial court's denial of the motion for a continuance was permissible under
7 *Morris*, which specifically noted the need to accord trial judges "a great deal of latitude in
8 scheduling trials. *Morris*, 461 U.S. at 11. Not only was there the speedy trial issue, the trial court
9 also was concerned that repeated delays after jurors were first summoned would result in the loss of
10 some jurors, and the prosecutor needed a date certain for the trial's start for purposes of lining up his
11 witnesses. *See id.* ("Not the least of [trial judges'] problems is that of assembling the witnesses,
12 lawyers, and jurors at the same place at the same time, and this burden counsels against continuances
13 except for compelling reasons.") The California Court of Appeal's rejection of Ms. Boode's due
14 process claim was not an unreasonable application of or contrary to clearly established Supreme
15 Court precedent.

16 The biggest problem for Ms. Boode is her complete failure to show any prejudice resulting
17 from the denial of the continuance, even if the denial of the continuance had amounted to
18 constitutional error. If constitutional error is found, habeas relief is warranted only if the error had a
19 "substantial and injurious effect or influence in determining the jury's verdict." *Penry v. Johnson*,
20 532 U.S. 782, 795 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)). *See Gallego*
21 *v. McDaniel*, 124 F.3d 1065, 1072 (9th Cir. 1997) (to obtain habeas relief, actual prejudice must be
22 shown from the refusal to grant a continuance). In denying Ms. Boode's motion for new trial, the
23 trial judge observed that all parties appeared to be well-prepared; the witnesses were vigorously
24 cross-examined; and the jurors heard all of the testimony, including testimony from allegedly
25 unreliable witnesses (including those witnesses' history, criminal conduct, drug use, grants of
26 immunity, and motives) but nonetheless believed them. CT 1669. The fact that the jury
27 deliberations took only two hours after several weeks of testimony also strongly indicates that a
28 continuance for Ms. Levy to further prepare would not have made a difference for Ms. Boode.

1 *United States v. Lopez*, 500 F.3d 840, 846 (9th Cir. 2007) (“Longer jury deliberations weigh against
2 a finding of harmless error because lengthy deliberations suggest a difficult case.”); *see, e.g., id.* at
3 846 (jury’s deliberation for 2.5 hours on illegal reentry case suggested any error in allowing
4 testimony or commentary on defendant’s post-arrest silence was harmless); *United States v.*
5 *Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (jury deliberation for 4 days supported
6 inference that impermissible evidence affected deliberations). Like the state appellate court, this
7 Court will not presume prejudice when none has been identified by the petitioner.

8 b. The Ineffective Assistance Of Counsel Claim

9 As mentioned at the outset of the discussion, Ms. Boode identified her denial-of-a-
10 continuance claim as a claim for “ineffective assistance of counsel” in her original federal habeas
11 petition, and identified it as a claim for a violation of her Sixth Amendment right to effective
12 assistance of counsel and her Fourteenth Amendment right to due process in her traverse. *Compare*
13 Docket # 1 at 7 *with* Docket # 15 at 3, 9. In the California Supreme Court, she had conceded that
14 counsel’s performance “did not rise to the very high level of constitutionally ‘ineffective’ counsel set
15 by *Strickland*.” Petition For Review at 6, 12.

16 Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings
17 either the fact or length of their confinement are required first to exhaust state judicial remedies,
18 either on direct appeal or through collateral proceedings, by presenting the highest state court
19 available with a fair opportunity to rule on the merits of each and every claim they seek to raise in
20 federal court. *See* 28 U.S.C. § 2254(b), (c). A district court may deny, but not grant, relief on a
21 habeas petition that presents an unexhausted claim. *See* 28 U.S.C. § 2254(b)(1). The district court
22 can deny an unexhausted claim “only when it is perfectly clear that the applicant does not raise even
23 a colorable federal claim.” *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005).

24 Ms. Boode’s claim that she was denied her Sixth Amendment right to effective assistance of
25 counsel as a result of the denial of a continuance is unexhausted because she never fairly presented
26 that claim to the California Supreme Court. Moreover, this court may deny relief on this
27 unexhausted claim because “it is perfectly clear,” *id.*, that Ms. Boode does not raise even a colorable
28 Sixth Amendment claim. In order to prevail on a claim that one has been denied her Sixth

1 Amendment right to effective assistance of counsel, a petitioner must establish two things. First, she
 2 must demonstrate that counsel's performance was deficient and fell below an "objective standard of
 3 reasonableness" under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-
 4 88 (1984). Second, she must establish that she was prejudiced by counsel's deficient performance,
 5 i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of
 6 the proceeding would have been different." *Id.* at 694. Ms. Boode has made no showing on either
 7 *Strickland* prong. Her unexhausted ineffective assistance of counsel claim is patently meritless and
 8 therefore is denied.

9 Ms. Boode is not entitled to the writ on her claims that the denial of a continuance violated
 10 her Sixth and Fourteenth Amendment rights.

11 B. Juror No. 8

12 Ms. Boode claims that she was deprived of her federal constitutional right to an impartial
 13 jury when the trial court refused to dismiss a juror who reported observing Ms. Boode's codefendant
 14 glare at and mouth words to a witness who was testifying against the defendants.

15 1. State Court Proceedings

16 During the trial, the court received a written message from Juror No. 8 saying that she had
 17 seen something frightening and that she wanted to talk about it without calling attention to
 18 herself. When Juror No. 8 was questioned by the court outside the presence of the jury, the
 19 juror said she had observed Rodriguez move his mouth to communicate with Elisary, one of
 20 the prosecution witnesses who had been testifying, in what Juror No. 8 perceived to be a
 21 threatening and intimidating manner. Juror No. 8 expressed fear from seeing Rodriguez give
 22 Elisary a "scary stare" and from "moving his lips and talking, saying something, just barely
 23 moving his lips." FN4 She stated she was "frightened" and the court acknowledged that she
 24 was crying. The trial court established that Juror No. 8 had not discussed her observations or
 25 fears with any other juror, and the court instructed her not to do so. The trial court moved to
 26 allay any fear by stating "we'll just watch very carefully" and indicating the deputies would
 27 be instructed "to make sure that the jurors are protected."

28 FN4. It is likely that the event described by Juror No. 8 actually occurred because the
 29 trial judge indicated that a member of his courtroom staff had also reported that he
 30 thought he saw "Mr. Rodriguez mouthing something to Mr. Elisary...."

When asked if she would hold Rodriguez's actions against him, Juror No. 8 replied, "To be
 honest, I don't know." When questioned whether she still could be fair and impartial, she
 replied, "I think I could decide the facts, but I would be scared if we convicted him." When
 asked if she could vote "not guilty" if the People did not prove their case, she replied, "I
 think so," which she then defined as "in between" an affirmative and negative answer to that
 question. In the end, she nodded her head up and down and said, "I think so" in answer to
 the court's question whether she could "keep an open mind" despite what she had observed.
 The court denied appellants' motion to excuse Juror No. 8 for bias.

1 Cal. Ct. App. Opinion at 9-10.

2 Ms. Boode's motion for new trial unsuccessfully asserted that Juror No. 8 should have been
3 dismissed. The trial court observed that, after the court and counsel had talked to Juror No. 8 in
4 chambers, everyone "appeared to be satisfied that she could continue to be a fair and impartial juror.
5 I know that you had some concerns about her, but once we spoke with her, the concerns were
6 alleviated." CT 1669-70.

7 Ms. Boode asserted on appeal that the failure to dismiss Juror No. 8 due to her exposure to
8 events outside the trial evidence violated Ms. Boode's Sixth Amendment and state law rights to an
9 impartial jury. The California Court of Appeal discussed only state law in rejecting Ms. Boode's
10 claims. Under state law, a juror who is "unable to perform his or her duty" may be discharged and
11 replaced by an alternate juror. Cal. Ct. App. Opinion at 10 (quoting Cal. Penal Code § 1089). Juror
12 No. 8's inability to serve as a juror would not be presumed, and was not shown as a "demonstrable
13 reality," as required for dismissal under state law. *Id.* "Despite her safety concerns, her responses to
14 the court's questions reflected that Juror No. 8 intended to do her best to give appellants a fair trial.
15 '[A] juror like this one, who candidly states [her] preconceptions and expresses concerns about
16 them, but also indicates a determination to be impartial, may be preferable to one who categorically
17 denies any pre-judgment but may be disingenuous in doing so. A reviewing court must allow the
18 trial court to make this sort of determination. The trial court is present and able to observe the juror
19 itself. It can judge the person's sincerity and actual state of mind far more reliably than an appellate
20 court reviewing only a cold transcript.'" Cal. Ct. Ap. Opinion at 10-11 (citations omitted; second
21 alteration added).

22 The California Court of Appeal also rejected Boode's argument that the trial court should
23 have allowed defense counsel to make follow-up inquiries of Juror No. 8 later in the trial to
24 determine whether she was still fearful. "[T]here is nothing (apart from rank speculation) to indicate
25 that Juror No. 8's impartiality was tainted by her earlier experience, or that she was unable to
26 disregard Rodriguez's courtroom conduct and render a verdict based on the evidence. 'One can
27 always argue further questioning might yield different and more favorable results, but that is a
28

1 matter committed to the discretion of the trial court.”” Cal. Ct. App. Opinion at 11 (citation
2 omitted).

3 2. Analysis of Sixth Amendment Claims

4 a. Juror Misconduct Claim

5 i. Clearly Established Law

6 The Sixth Amendment guarantees the criminally accused the right to a fair trial by a panel of
7 impartial jurors. U.S. Const. amend. VI; *see Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The jury’s
8 verdict “must be based upon the evidence developed at the trial.”” *Turner v. Louisiana*, 379 U.S.
9 466, 472 (1965). “In the constitutional sense, trial by jury in a criminal case necessarily implies at
10 the very least that the ‘evidence developed’ against a defendant shall come from the witness stand in
11 a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of
12 cross-examination, and of counsel.” *Id.* at 472-73. Juror exposure to extraneous influences is
13 considered juror misconduct, even when the exposure is not the juror’s fault.

14 The “clearly established Federal law, as determined by the Supreme Court of the United
15 States,” 28 U.S.C. § 2254(d), regarding juror misconduct based on extrinsic influences comes from
16 three Supreme Court cases: *Mattox v. United States*, 146 U.S. 140 (1892), *Remmer v. United States*,
17 347 U.S. 227 (1954), and *Smith v. Phillips*, 455 U.S. 209, 217 (1982). In *Mattox*, the Supreme Court
18 articulated the rule: “Private communications, possibly prejudicial, between jurors and third persons,
19 or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least
20 unless their harmlessness is made to appear.” *Mattox*, 146 U.S. at 150. *Remmer* later restated the
21 rule and elaborated on the presumption of prejudice:

22 In a criminal case, any private communication, contact, or tampering directly or indirectly,
23 with a juror during a trial about the matter pending before the jury is, for obvious reasons,
24 deemed presumptively prejudicial, if not made in pursuance of known rules of the court and
25 the instructions and directions of the court made during the trial, with full knowledge of the
parties. The presumption is not conclusive, but the burden rests heavily upon the
Government to establish, after notice to and hearing of the defendant, that such contact with
the juror was harmless to the defendant.

26 *Remmer*, 347 U.S. at 229.

27 The *Smith* case focused on the procedural steps the trial court must take when potential juror
28 misconduct arises. The Constitution “does not require a new trial every time a juror has been placed

1 in a potentially compromising situation.” *Smith*, 455 U.S. at 217. “Due process means a jury
2 capable and willing to decide the case solely on the evidence before it, and a trial judge ever
3 watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when
4 they happen.” *Id.* The trial judge can ““determine the circumstances, the impact thereof upon the
5 juror, and whether or not [they were] prejudicial, in a *hearing* with all interested parties permitted to
6 participate.”” *Id.* (quoting *Remmer*, 347 U.S. at 230 (1954)). The trial judge may ascertain the
7 impartiality of the juror “by relying solely upon the testimony of the juror in question.” *Id.* at 215;
8 *see also id.* at 217 n.7 (rejecting the argument that the evidence from the juror in question “is
9 inherently suspect”).

ii. State Courts Unreasonably Applied *Mattox* and *Remmer*

In Ms. Boode’s case, the trial court took steps to inquire into the reported problem and held a hearing similar to that contemplated in the Supreme Court cases of *Remmer* and *Smith*, i.e., a hearing with counsel for the parties present at which the trial judge “determine[d] the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial.” *Smith*, 455 U.S. at 217; *Remmer*, 347 U.S. at 230. The trial court also allowed counsel to question Juror No. 8 at the hearing, as contemplated by *Remmer* and *Smith*. See RT 1105.⁴

17 Although the trial court held a hearing similar to that contemplated in *Remmer* and *Smith*, the
18 hearing in Ms. Boode’s case was constitutionally deficient in that the *Remmer* presumption played
19 no role. There simply is no indication that the trial court considered Juror No. 8’s observation of
20 Mr. Rodriguez’s menacing behavior toward the witness to be “presumptively prejudicial.” *Remmer*,
21 347 U.S. at 229. Nor is there any indication that the trial court placed any burden (let alone a heavy
22 one) “upon the Government to establish” that the incident “was harmless” to Ms. Boode. *Id.* The

25 ⁴ The trial court’s refusal to reopen the inquiry later in the trial to let defense counsel pose
26 further questions to Juror No. 8 was not unreasonable as nothing further had occurred. As the
27 California Court of Appeal stated, the requests to further question the juror later in the trial were
28 based on nothing more than “rank speculation” that Juror No. 8’s “impartiality was tainted by her
earlier experience, or that she was unable to disregard Rodriguez’s courtroom conduct and render a
verdict based on the evidence.” Cal. Ct. App. Opinion at 11. Neither *Remmer* nor any other
Supreme Court case required *repeated* inquiries into one incident of potential juror misconduct.

1 Government did not meet its burden of overcoming the presumption that Juror No. 8 was no longer
2 impartial.

3 The California Court of Appeal repeated the trial court’s error. The state law test identified
4 by the California Court of Appeal did not conform to *Remmer* because, rather than place a heavy
5 burden on the Government to show the incident to be harmless, that test put the burden on the
6 defendants to show Juror No. 8’s inability to serve as a juror “as a demonstrable reality.” Cal. Ct.
7 App. Opinion at 10. Although the California Court of Appeal discussed only the state law claim,
8 nothing in the opinion suggests that the state appellate court approached the federal constitutional
9 claim differently. The state appellate court’s rejection of the claim leads to the conclusion that it
10 unreasonably failed to apply the *Remmer* presumption, because no reasonable jurist could review the
11 transcript of the Juror No. 8 hearing and conclude that the prosecution had rebutted the presumption
12 of prejudice. The final few questions of Juror No. 8 at the hearing showed a juror who was uncertain
13 as to whether she could do her juror functions, and a hearing at which the only evidence is a hesitant,
14 scared and uncertain juror is not one at which the prosecution has overcome the *Remmer*
15 presumption of prejudice.

16 Due to the failure of the trial court and the California Court of Appeal to apply the
17 *Remmer* presumption, the federal habeas court need not defer to the state court's apparent finding
18 that Juror No. 8's impartiality was unaffected by her observation of Mr. Rodriguez's conduct.
19 "AEDPA's presumption of correctness does not apply to state court findings arrived at through the
20 use of erroneous legal standards." *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 698
21 (9th Cir. 2004). When, as here, the trial court and state appellate court have failed to evaluate the
22 juror misconduct claim without presuming prejudice and without placing the burden on the
23 Government to overcome that presumption, the federal habeas court reviews the matter "*de novo*"
24 whether the government showed that there was no reasonable possibility that the communication
25 influenced the verdict." *Id.*

iii. A Constitutional Error Occurred

27 In applying *de novo* review, the Court notes this juror misconduct claim is somewhat unusual
28 in that the juror's reaction appears quite out of proportion to the event she observed. But the event

1 did amount to misconduct under the Supreme Court's definition, and did trigger the *Remmer*
 2 presumption. Juror No. 8's observation of Mr. Rodriguez's menacing behavior toward a witness
 3 was extrinsic evidence because it did not "come from the witness stand." *Turner*, 379 U.S. at 473.
 4 See *United States v. Simtob*, 485 F.3d 1058, 1064-65 (9th Cir. 2007) (defendant's alleged act of
 5 "eye-ballng" a juror that made the juror feel "threatened" raised a presumption of prejudice
 6 "because 'even indirect coercive contacts that could affect the peace of mind of the jurors give rise
 7 to the *Remmer* presumption'"); *United States v. Schuler*, 813 F.2d 978, 981 (9th Cir. 1987)
 8 (prosecutor's comment on nontestifying defendant's courtroom laughter during presentation of
 9 evidence of his threatening comments impinged on defendant's Fifth Amendment right not to be
 10 convicted except on the basis of evidence adduced at trial). But see *Schuler*, 813 F.2d at 983 (Hall,
 11 J., dissenting) ("The principle that a defendant's courtroom demeanor is evidence is well-settled").
 12 Juror No. 8's observation of Mr. Rodriguez's conduct exposed her to an extrinsic influence.
 13 Therefore, the presumption of prejudice arose with regard to Juror No. 8 under *Remmer*, 347 U.S. at
 14 228, because that presumption arises when the juror is exposed to an extrinsic influence. While this
 15 case is different from the more typical context of e.g., a telephone call from an unnamed person
 16 telling a juror that an acquittal could be profitable for the juror in *Remmer*, the ongoing
 17 fraternization between jurors and the two deputies who were both key witnesses and the caretakers
 18 of the jurors during the three-day trial in *Turner*, or the juror contacting the prosecutor's office
 19 during trial to apply for a job as an investigator in *Smith*, the evidence here which frightened Juror
 20 No. 8 is extrinsic evidence.⁵

21
 22 ⁵ Neither the trial court nor the California Court of Appeal found that there was not an
 23 extrinsic influence on Juror No. 8, and the parties do not argue that there was not an extrinsic
 24 influence.

25 The Court notes there is some question as to whether a defendant's in-court behavior actually
 26 can amount to an extrinsic influence on a juror. See *Wilson v. United States*, 505 F. App'x 884, 886
 27 (11th Cir. 2013) ("We have yet to consider in a published opinion whether a defendant's alleged
 28 staring at the jury constituted an 'extraneous' or 'extrinsic' contact such that the district court was
 required to conduct further inquiry [under *Remmer*, 347 U.S. 227], and we note that our sister
 circuits are split on the issue") The U.S. Supreme Court has quoted with approval a jury instruction
 advising the jury to consider the defendant's "'demeanor and conduct upon the witness stand and
 during the trial,'" although that case was different from the present one in that the defendant had
 testified. See *Reagan v. United States*, 157 U.S. 301, 308-09 (1895). Several other lower courts
 have considered a defendant's in-court behavior to be something that a jury may consider. See, e.g.,

1 Due to the existence of juror misconduct – in the sense that Juror No. 8 was exposed to
2 extrinsic evidence – the trial court was required to consider the impact of the exposure to extrinsic
3 evidence on Juror No. 8 in order to determine whether she had to be removed from the jury. Juror
4 No. 8's statements were equivocal and hesitant throughout that hearing. A review of the transcript
5 leaves the reader with a feeling that maybe Juror No. 8 could decide the case properly and maybe
6 she could not decide it properly. The final few questions and answers at the hearing show Juror No.
7 8's lingering uncertainty as to whether she could do her juror functions.

8 THE COURT: Is there anything about that that would cause you to hold it
9 against Mr. Rodriguez in the final analysis in this case?
10
11 [JUROR NO. 8]: I don't know. To be honest, I don't know.
12
13 [THE PROSECUTOR]: And do you understand –
14
15 [JUROR NO. 8]: It might be hard.
16 * * *
17
18 [THE PROSECUTOR]: Do you think you could still be fair and impartial in this case
19 sitting as a juror and decide the facts and decide the facts based
upon the evidence?
20
21 [JUROR NO. 8]: I think I could decide the facts, but I would be scared if we
22 convicted him. Just I know it's probably crazy.
23
24 THE COURT: So as a result of that, you would, if [the prosecutor] proved the
25 case beyond a reasonable doubt, you would vote not guilty,
26 even if he proved the case, just because of that?
27
28 [JUROR NO. 8]: I don't think I could vote not guilty. I would just go on being
29 scared after that.

22 *United States v. Gatto*, 995 F.2d 449, 453-56 (1993) (prosecutor's comment on nontestifying defendant's menacing look at testifying witness did not violate his constitutional right "to be judged solely on the basis of evidence adduced at trial" where witness testified that he saw those menacing looks); *Maiello v. Edwards*, 1998 WL 230956 (S.D. N.Y. 1998) (habeas relief not warranted for prosecutor's comment on nontestifying defendant's demeanor in the courtroom because it was not a testimonial communication and the behavior was not compelled); *United States v. Calabrese*, 2008 WL 1722137 (N.D. Ill. 2008) (during closing argument, juror observed one of several defendants utter a threat to a prosecutor; trial court finds that the threat is not extraneous evidence and "[i]t is axiomatic that there is nothing improper about a jury observing a defendant's courtroom demeanor during trial"); *Waller v. United States*, 179 F. 810, 812 (8th Cir. 1910) ("The demeanor of the defendant is not only proper evidence, but it is impossible to prevent the jury from observing and being influenced by it."). See generally 2 J. Wigmore, *Evidence* § 274 (J. Chadbourne rev. ed. 1979) ("the attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory").

1 THE COURT: But if [the prosecutor] did not prove the case beyond a
2 reasonable doubt, could you vote not guilty.
3
4 [JUROR No. 8]: I think so.
5
6 [DEFENSE COUNSEL]: I'm sorry, Your Honor. I couldn't tell if that was affirmative
7 or negative?
8
9 [JUROR No. 8]: I think it was, it was in between.
10
11 RT 1107-08. At that point, the state of the evidence was that Juror No. 8 "was in between" as to
12 whether she could vote not guilty if the prosecutor did not prove his case beyond a reasonable doubt.
13 The trial judge did note that there was more evidence to be presented, and asked whether Juror No. 8
14 could, "as [she] promised before," "keep an open mind, and for both sides," to which Juror No. 8
15 nodded her head up and down and said, "I think so." RT 1109. Her uncertainty as to her ability to
16 serve impartially was evident.
17
18 Moreover, Juror No. 8 was frightened by the event and, when asked if her observation would
19 interfere with her ability to continue to be fair and impartial as a juror in this case, she said, "I don't
20 know. I don't know," and was crying. RT 1104. As the court and prosecutor suggested at the
21 hearing, some of the juror's distress may have been as much due to the testimony at trial about the
22 murders, gangs, and threats against witnesses as Mr. Rodriguez's in-court behavior. *See* RT 1104,
23 1113. Nonetheless, she attributed her fear to Mr. Rodriguez's menacing look. Juror No. 8 stated
24 that Mr. Rodriguez's staring at and mouthing words to witness Elisary "scared" her, and that she felt
25 "sort of exposed where I'm sitting because he often looks over, and I just feel vulnerable." RT
26 1103; *see also* RT 1104 ("I'm just frightened.") When asked if she was "concerned [she] may be
27 hurt or injured because of what [she] observed in the courtroom?" Juror No. 8 responded, "[a] little.
28 A little bit. Just because of all the people there, you know, I get nervous. Out there, in the audience.
29 And, you know, it's they all have friends and, you know, it's just kind of a little paranoia, looking
30 over my shoulder. I mean, we don't have escorts to our cars or anything." RT 1105. Juror No. 8
31 also had wanted to submit a question for the witness but "was afraid to" because "[i]t would have
32 sounded to them as if I were favoring [this witness's] testimony in some way." RT 1108. Although
33 it was the codefendant's behavior that frightened Juror No. 8, the fear affected Juror No. 8's view of
34 Ms. Boode also. As Ms. Boode points out, Juror No. 8 grouped the codefendants together in some
35 ways, and she was afraid that the other jurors would do the same.

1 of her comments: Juror No. 8 worried because “**they** all have friends,” RT 1105; Juror No. 8 did not
2 want “the **defendants**” to find out what she was saying, RT 1106; and Juror No. 8 worried that, had
3 she passed a question for Elisary to the bailiff as she wanted to, “[i]t would have sounded **to them** as
4 if [she] were favoring [Elisary’s] testimony in some way,” RT 1108. Docket # 15 at 10 (emphasis
5 added).

6 The trial judge’s comments – undoubtedly meant to assuage Juror No. 8’s fears – may have
7 reinforced Juror No. 8’s belief that the defendants were people to be feared. The trial judge started
8 to suggest that Juror No. 8 could have an escort if she was concerned. RT 1105. She also assured
9 Juror No. 8 that “[w]e’re going to watch very carefully and tell the deputies to make sure that the
10 jurors are protected,” and that she (the judge) would be the most likely target if the defendants “were
11 going to go after anybody.” RT 1106. After Juror No. 8 remained concerned that she did not want
12 the defendants to “find out that [she was] saying these things” and she didn’t want any attention, RT
13 1106, the trial judge made sure Juror No. 8 could leave chambers unobserved by the defendants.
14 See RT 1110-11. Through words and deeds, the trial judge may have implicitly conveyed that the
15 defendants were dangerous individuals.

16 On this record, the prosecution did not meet its heavy burden to show that Juror No. 8’s
17 observation of Mr. Rodriguez’s menacing behavior was harmless to Ms. Boode. Rather than explain
18 why the incident was harmless, the prosecutor suggested that the court could keep Juror No. 8 on the
19 jury and “re-address the issue later on. We don’t lose anything by dismissing her at the conclusion
20 of the case.” RT 1113. The court rejected that proposal because, although the juror was afraid, “she
21 didn’t say she couldn’t be . . . fair and impartial.” RT 1113. Applying the *Remmer* presumption,
22 this Court concludes that juror misconduct has been shown and the prosecution did not meet its
23 heavy burden to rebut the presumption and show the incident to be harmless to the defense.

24 iv. The Error Was Harmless Under Brecht

25 In a federal habeas action, the receipt of extrinsic evidence or extraneous information by
26 jurors is “generally subject to a ‘harmless error’ analysis, namely, whether the error had [a]
27 ‘substantial and injurious’ effect or influence in determining the jury’s verdict.” *Estrada v.*
28 *Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008); *see Brecht v. Abrahamson*, 507 U.S. 619, 638

(1993)). Although the *Remmer* presumption and the *Brech* test do not fit together comfortably, both must be applied. *See generally Barnes v. Joyner*, 751 F.3d 229, 252-53 (4th Cir. 2014) (remanding to district court for application of *Brech* test, after concluding that the state court's adjudication of the juror misconduct claim was an unreasonable application of *Remmer*).⁶ The *Remmer* presumption applies to determine whether there was juror misconduct (including whether the juror was prejudiced) amounting to a constitutional violation; *Brech* applies to determine whether such constitutional violation was harmless to the petitioner. When the court applies the *Brech* test, the petitioner is “not entitled to the *Remmer* presumption in attempting to make this [*Brech*] showing because the presumption does not apply in the federal habeas context when proving a substantial and injurious effect or influence *on the jury’s verdict*. [Citations.] Therefore, to be entitled to habeas relief, [the petitioner] will need to affirmatively prove actual prejudice by demonstrating that the jury’s verdict was tainted by the extraneous communication.” *Barnes*, 751 F.3d at 252-53 (emphasis added).

In the case at bar, habeas relief is not available on the juror misconduct claim, because Ms. Boode has not shown that the constitutional error had a substantial and injurious effect or influence on the jury’s verdict. First, Mr. Rodriguez’s staring at and mouthing words at the witness was quite consistent with the witness’ testimony about Mr. Rodriguez. *See generally Henry v. Ryan*, 720 F.3d

⁶ The Ninth Circuit’s cases on juror misconduct have taken several different approaches, with none of those cases actually holding that both *Remmer* and *Brech* tests should be applied or that one test should be used to the exclusion of the other. *Compare Smith v. Swarthout*, 742 F.3d 885, 894 (9th Cir. 2014) (not mentioning *Remmer*, *Mattox* or any presumption of prejudice; “[o]n collateral review, trial errors—such as extraneous information that was considered by the jury—are generally subject to a ‘harmless error’ analysis, namely, whether the error had ‘substantial and injurious’ effect or influence in determining the jury’s verdict.”), and *Estrada*, 512 F.3d at 1235, 1238 (applying *Brech* test to evaluate the consideration of extraneous information by the jury), with *Caliendo v. Warden of California Men’s Colony*, 365 F.3d 691, 697, 699 (2004) (reversing with directions to grant relief after concluding only that state court’s failure to presume prejudice under the *Remmer/Mattox* rule was contrary to clearly established federal law), and *Xiong v. Felker*, 681 F.3d 1067, 1076 (9th Cir. 2012) (identifying the *Remmer* presumption as part of the juror misconduct rule and finding no error), with *Fields v. Brown*, 503 F.3d 755, 779-81 (9th Cir. 2007) (*en banc*) (pre-AEDPA case, mentioning the *Remmer/Mattox* rule and declining to decide whether the event (a juror’s use of a Bible to make a list of pros and cons, with Biblical passages as support) was juror misconduct because it was harmless under the *Brech* standard). By applying both the *Remmer* presumption and the *Brech* test, this Court follows both the spirit of § 2254(d)(1), which requires the Court to look to Supreme Court precedent to identify the “clearly established law” by which to evaluate a habeas claim, and the purpose of *Brech*, which limits habeas relief only to those constitutional errors that have an actual and injurious effect on the jury’s verdict.

1 1073, 1085 (9th Cir. 2013) (denying certificate of appealability for claim of juror misconduct based
2 on experiment done by two jurors because he could not satisfy the *Brecht* test; “extraneous
3 information is less likely to be prejudicial when, as in this case, it ‘merely confirmed what any
4 reasonable juror already knew’”); *cf. Drayden v. White*, 232 F.3d 704, 710-11 (9th Cir. 2000) (even
5 if trial court erred in instructing jury that it could consider petitioner’s in-court outburst, the error
6 was not prejudicial because, among other things, “it is unlikely that the outburst prejudiced
7 Petitioner by causing the jurors to think less of him than they did before the outburst”). As the court
8 and prosecutor suggested at the hearing, some of Juror No. 8’s distress may have been as much due
9 to the testimony at trial about the murders, gangs, and threats against witnesses as Mr. Rodriguez’s
10 in-court behavior. *See* RT 1104, 1113. The recipient of the glaring and mouthing of words was Mr.
11 Elisary, who testified, among other things: (1) both Ms. Boode and Mr. Rodriguez were in criminal
12 street gangs, and Mr. Rodriguez was one of the leaders in his gang, RT 721-724; (2) Ms. Boode, Mr.
13 Rodriguez and Mr. Elisary planned in advance that Ms. Boode (who was carrying a .357 revolver)
14 would demand the money and Mr. Rodriguez would “be the muscle,” RT 745, 760-61; (3) Ms.
15 Boode told Mr. Elisary that she shot the husband in the back and chased the wife into the bedroom
16 where she shot her in the neck or facial areas, RT 772-75; (4) Mr. Rodriguez said that he choked the
17 husband with a string or cord until he couldn’t hear him any more, RT 776, and that Mr. Rodriguez
18 had cleaned and placed the .357 revolver and a casing near a victim to try to make the killings look
19 like a murder-suicide, RT 780; (5) after the killings, Ms. Boode decided that they should tell the
20 police that they left when the victims were arguing, to support the murder-suicide story, RT 781; (6)
21 after the killings, Mr. Rodriguez told Mr. Elisary to “keep [his] mouth shut” and threatened to hurt
22 Mr. Elisary and his family, RT 785; (7) Mr. Rodriguez made another implicit threat to Mr. Elisary’s
23 family after Mr. Elisary testified at the preliminary hearing, RT 786-87; and (8) Mr. Elisary felt that
24 his life was in danger in prison from any inmate as a result of testifying, RT 799-800.

25 Second, the incident occurred on the eleventh or twelfth day of a 21-day trial, long before
26 jury deliberations began. There was substantial evidence of guilt. Numerous witnesses incriminated
27 Ms. Boode along with the other defendant.

28

1 Third, Juror No. 8 was exposed to the external influence for a very short amount of time; in
2 fact, neither the court nor counsel even noticed the incident that had taken place in open court. *See*
3 *generally Henry*, 720 F.3d at 1086 (“The Supreme Court, for instance, has found juror misconduct to
4 warrant reversal in cases involving *extended* external influences on jurors or confirmed juror *bias* –
5 neither of which is present here”).

6 Fourth, Juror No. 8 confirmed to the court that she had not discussed the matter with any
7 other juror, and was instructed not to discuss the matter with other jurors. RT 1104.

8 Fifth, the jury deliberated only two hours before returning a verdict, suggesting this was not a
9 close case. *See United States v. Lopez*, 500 F.3d 840, 846 (9th Cir. 2007) (“Longer jury
10 deliberations weigh against a finding of harmless error because lengthy deliberations suggest a
11 difficult case.””).

12 Ms. Boode has not shown that the error in not dismissing Juror No. 8 had a “substantial and
13 injurious effect or influence in determining the jury’s verdict,” *Brecht*, 507 U.S. at 637. Ms. Boode
14 therefore is not entitled to federal habeas relief on her juror misconduct claim.

15 b. Juror Bias Argument

16 The presence of an actually biased juror would violate the Sixth Amendment’s right to an
17 impartial jury and would support habeas relief. Actual bias in a juror has been defined as “‘the
18 existence of a state of mind that leads to an inference that the person will not act with entire
19 impartiality.’ Actual bias is typically found when a prospective juror states that he can not be
20 impartial, or expresses a view adverse to one party’s position and responds equivocally as to whether
21 he could be fair and impartial despite that view.” *Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007)
22 (en banc) (citations omitted) (rejecting claim of actual bias in juror who said he put aside the fact
23 that his wife was the victim of a similar assault and represented that he was impartial). “It is
24 sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based
25 on the evidence presented in court.” *Irvin v. Dodd*, 366 U.S. 717, 723 (1961) (defendant was denied
26 a trial by an impartial jury as a result of extensive adverse pretrial publicity). Implied bias (e.g., bias
27 that may be presumed from a juror who repeatedly lies during voir dire or a juror who is closely
28 related to a litigant) would not support habeas relief because the “Supreme Court has never

1 explicitly adopted or rejected the doctrine of implied bias.” *See Hedlund*, 750 F.3d at 808. Unlike
 2 juror misconduct, the presence of an actually biased juror is structural error, requiring a new trial
 3 without a need to show prejudice under *Brecht*. *See Smith v. Swarthout*, 742 F.3d 885, 892 n.2 (9th
 4 Cir. 2014).

5 Juror No. 8 was frightened by seeing Mr. Rodriguez glare at and mouth words to the
 6 testifying witness but stated on the record that she could set aside what she had observed and keep
 7 an open mind. She also confirmed that she could “decide the facts” and affirmed that she could vote
 8 “not guilty” if the prosecution did not prove its case. *See* RT 1108-09. Although Juror No. 8
 9 appeared tentative in her wording – saying things such as “I think so” rather than “I absolutely
 10 could” when asked if she could “keep an open mind, and for both sides?” – her inflection, tone and
 11 demeanor are the sort of factors that go into the trial judge’s determination of her impartiality and
 12 are presumptively correct in a federal habeas proceeding. *See Hedlund*, 750 F.3d at 807 (in a § 2254
 13 proceeding, the state trial judge’s findings regarding juror bias or misconduct are “‘presumptively
 14 correct’ and cannot be overcome without clear and convincing evidence”); *cf. Skilling v. United
 15 States*, 561 U.S. 358, 395-96 (2010) (in reviewing claims that the trial court failed to dismiss a juror
 16 for actual bias during voir dire, “the deference due to district courts is at its pinnacle”). The
 17 presumption of correctness under *Hedlund* and 28 U.S.C. § 2254(e)(1) in the trial court’s implicit
 18 determination that Juror No. 8 was not actually biased has not been overcome by Ms. Boode.⁷ It was
 19 not an unreasonable application of Supreme Court precedent for the California Court of Appeal to
 20 conclude that Ms. Boode had not shown actual bias by Juror No. 8, especially in light of Juror No.
 21 8’s affirmative representations that she would try to do her duty and thought she could judge the
 22 facts fairly.

23 Ms. Boode cannot obtain relief on her claim that she was denied a trial by an impartial jury
 24 because she has not met her burden to show that the California Court of Appeal’s rejection of her
 25

26 ⁷ For the juror misconduct analysis, no § 2254(e)(1) deference was given to the state court
 27 factual findings because an incorrect legal framework was used by the state court in evaluating the
 28 juror misconduct claim. In evaluating the juror bias claim, the state court did not apply an incorrect
 legal framework and thus this Court is not free from the constraints of § 2254(e)(1) on the juror bias
 claim.

1 jury misconduct claim “was so lacking in justification that there was an error well understood and
2 comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v.*
3 *Richter*, 562 U.S. at 103 (discussing the very restrictive nature of § 2254(d)).

4 C. Failure to Query Other Jurors About Mr. Rodriguez’s Behavior

5 At the hearing at which Juror No. 8 informed the trial court of her concerns about seeing Mr.
6 Rodriguez glaring and mouthing words to a witness, she said she had not discussed the matter with
7 other jurors. RT 1104. When defense counsel moved for a mistrial “because the jury pool now is
8 tainted by Juror No. 8’s emotional status and by her fear of continuing in the jury,” the trial court
9 denied the motion, noting that Juror No. 8 had not done anything and had said she did not discuss
10 the matter with the other jurors. RT 1114. Ms. Boode now claims that her right to an impartial jury
11 was violated by the trial court’s failure to inquire whether other jurors saw the same incident of her
12 codefendant glaring at and mouthing words to the testifying witness, and whether any of them were
13 affected by such behavior. Docket # 1 at 6.

14 The California Court of Appeal rejected Ms. Boode’s claim, explaining that Juror No. 8 had
15 indicated “that she had not discussed the matter with any other juror. Examining each juror
16 individually, therefore, would have drawn unnecessary attention to Rodriguez’s behavior, and
17 possibly given rise to a claim that such inquiry prejudiced the panel.” Cal. Ct. App. Opinion at 11.
18 The state appellate court also noted that, even if other jurors observed the threatening gestures, there
19 was no reason to assume any juror was so upset that he or she could not be able to perform his or her
20 duties as a juror. *Id.* None came forward to express the concerns voice by Juror No. 8. It was not
21 an abuse of discretion for the trial court to “tak[e] a ‘wait and see’ approach concerning whether any
22 juror other than Juror [No. 8] might have been affected” by Rodriguez’s courtroom behavior. We
23 conclude that the scope of questioning into the possibility of juror bias in this case fell well within
24 the proper exercise of the court’s discretion. No further inquiry was required.” Cal. Ct. App.
25 Opinion at 11-12 (second alteration in source).

26 The California Court of Appeal’s rejection of this claim was not contrary to or an
27 unreasonable application of clearly established Supreme Court precedent. Although a hearing was
28 held for Juror No. 8, who had reported a concern about Mr. Rodriguez’s behavior in court, the

1 Supreme Court has never clearly established that all jurors must be questioned whenever an
2 extraneous influence has been observed by one of them. The Supreme Court “has not yet decided
3 whether due process requires a trial court to hold a hearing *sua sponte* whenever evidence of juror
4 bias comes to light.” *Sims v. Rowland*, 414 F.3d 1148, 1153 (9th Cir. 2005); *see, e.g., id.* (trial court
5 declined to hold a hearing to investigate the matter after jurors sent two notes expressing concern
6 that defendant was looking at their personal information in the jury questionnaires and was taking
7 notes on them; habeas relief not available due to lack of Supreme Court precedent requiring a
8 hearing to investigate possible juror bias); *Grottemeyer v. Hickman*, 393 F.3d 871, 880-81 (9th Cir
9 2004) (*Remmer* did not require an evidentiary hearing without evidence showing the jurors
10 discussed potentially prejudicial extrajudicial information); *Tracey v. Palmateer*, 341 F.3d 1037,
11 1044 (9th Cir. 2003) (“*Remmer* and *Smith* do not stand for the proposition that *any time* evidence of
12 juror bias comes to light, due process requires the trial court to question the jurors alleged to have
13 bias.”); *id.* (*Smith* and *Remmer* have been interpreted “as providing a flexible rule.”). Not only was
14 there no Supreme Court precedent requiring a hearing to question all the jurors about Mr.
15 Rodriguez’s behavior, the California Court of Appeal reasonably concluded that the risk of such
16 questioning (possibly causing prejudice by alerting jurors to Mr. Rodriguez’s alleged menacing
17 behavior that they otherwise hadn’t seen and incidentally stressing its importance by querying them
18 about it) outweighed the potential benefit of finding out whether any other juror saw the incident that
19 appeared to cause no upset to any juror other than Juror No. 8. There did not seem to be much doubt
20 that the incident had occurred – a court staff member also reported it – but the judge and attorneys
21 hadn’t seen the incident and perhaps other jurors didn’t either; those other jurors certainly would
22 have been made aware of it if questioned about it. The key question was what impact it had on any
23 juror who had seen it, yet only Juror No. 8 reported being bothered by it. The trial court reasonably
24 concluded that other jurors did not need to be questioned about an incident that apparently had not
25 upset any of them if observed by any of them. Due to the absence of clearly established Supreme
26 Court precedent on point, § 2254(d)(1) bars relief on the claim that the state trial court violated Ms.
27 Boode’s constitutional rights by refusing to hold a hearing to determine whether any other juror saw
28 the incident and was affected by it. Further, for the same reasons stated in the previous section, Ms.

1 Boode has failed to show that the failure to question other jurors about the incident had a
 2 “substantial and injurious effect or influence in determining the jury’s verdict,” *Brecht*, 507 U.S. at
 3 637. *See Sims*, 414 F.3d at 1152-53 (claim of failure to investigate alleged juror bias is not structural
 4 error).

5 D. Eighth Amendment Claim Regarding The Sentence

6 “To pass constitutional muster, a capital sentencing scheme must ‘genuinely narrow the class
 7 of persons eligible for the death penalty and must reasonably justify the imposition of a more severe
 8 sentence on the defendant compared to others found guilty of murder.’” *Lowenfield v. Phelps*, 484
 9 U.S. 231, 244 (1988) (citation omitted). This narrowing function can be achieved by either laws that
 10 “narrow the definition of capital offenses” or laws that “more broadly define capital offenses and
 11 provide for narrowing by jury findings of aggravating circumstances at the penalty phase.” *Id.* at
 12 246.

13 Ms. Boode argues that the foregoing narrowing principle from Eighth Amendment death
 14 penalty jurisprudence should be applied in the context of sentences of life imprisonment without the
 15 possibility of parole (“LWOP”). Ms. Boode argues that her LWOP sentence violates the Eighth
 16 Amendment because “there was no meaningful basis for [the] jury to distinguish the factual findings
 17 necessary to return a verdict of first degree robbery felony murder” from the factual findings
 18 necessary to find true the robbery special circumstances allegation under § 190.2(a)(17).⁸ Docket #
 19 1 at 8. Her view is that § 190.2(a)(17) violates the Eighth Amendment because it does not narrow
 20 the class of murderers eligible for the death penalty or LWOP sentences from the group of murderers
 21 who otherwise will receive a sentence of 25 years to life.⁹

22

23 ⁸ Under California law, first degree murder is punishable by death, life imprisonment without
 24 the possibility of parole, or 25 years to life in prison. *See Cal. Penal Code § 190(b)*. If a defendant
 25 is found to have committed the first degree murder in the course of certain felonies, including
 26 robbery, the punishment is death or life imprisonment without the possibility of parole. *See Cal.*
 27 *Penal Code § 190.2(a)(17)*.

28 ⁹ Ms. Boode noted in a state court brief that her entire Eighth Amendment argument about
 29 the felony murder special circumstances finding under § 190.2(a)(17) is largely an academic point
 30 because “the jury also found ‘true’ a special circumstance allegation of ‘multiple murders,’” which
 31 is not covered by her challenge and therefore would support the LWOP sentence regardless of her
 32 challenge to § 190.2(a)(17). Petition For Review at 22 n.6.

1 The California Court of Appeal flatly rejected this argument because “the Eighth
 2 Amendment’s narrowing requirement has been found not to ly to life-without-parole sentences but
 3 only to sentences of death.” Cal. Ct. App. Opinion at 19 (citing *Harmelin v. Michigan*, 501 U.S.
 4 957, 995-96 (1991)).¹⁰

5 The California Court of Appeal’s rejection of Ms. Boode’s Eighth Amendment claim was not
 6 contrary to or an unreasonable application of clearly established Federal law, as set forth by the U.S.
 7 Supreme Court. The narrowing principle applicable in the death penalty context has never been held
 8 by the Supreme Court to apply to the non-death penalty context. In fact, “the Supreme Court has
 9 refused to extend this rule to require states to distinguish between criminals sentenced to LWOP and
 10 those sentenced” to life with the possibility of parole or lesser sentences. *Houston v. Roe*, 177 F.3d
 11 901, 906 (9th Cir. 1999) (citing *Harmelin*, 501 U.S. at 995); *see also Bradway v. Cate*, 588 F.3d 990,
 12 991 (9th Cir. 2009) (petitioner with LWOP sentence “recognizes that he lacks standing for an Eighth
 13 Amendment death penalty challenge because he was not sentenced to death”); *cf. id.* at 992
 14 (Supreme Court has not issued a holding regarding the failure to narrow the class of first degree
 15 murderers to those properly eligible for an LWOP sentence); *id.* (Supreme Court also has not
 16 decided any case “that could reasonably support [a] due process claim of unconstitutional vagueness
 17 based on a failure to narrow the class subjected to more severe penalties”). Ms. Boode conceded in
 18 state court that the narrowing principle has not been extended to LWOP sentences, and explained
 19 that she was making the argument “to preserve it for federal review, if the United States Supreme
 20 Court determines in [the] future that Penal Code [§ 190.2(a)] violates the Eighth Amendment.”
 21 Petition For Review at 26.

22 Due to the Supreme Court’s refusal to extend the narrowing principle to the LWOP context,
 23 the state court of appeal’s failure to extend the principle to the LWOP context does not support relief
 24 under § 2254(d)(1). “Section 2254(d)(1) provides a remedy for instances in which a state court

25
 26 ¹⁰ The California Court of Appeal also rejected the challenge for the additional reason that
 27 controlling California Supreme Court precedent had ““consistently rejected the claim that the
 28 statutory special circumstances ... do not adequately narrow the class of persons subject to the death
 Cal. Ct. App. Opinion at 19-20.

1 unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent
2 or license federal courts to treat the failure to do so as error." *White v. Woodall*, 134 S. Ct. 1697,
3 1706 (2014) (in capital case, not objectively unreasonable for state court not to extend to penalty
4 phase constitutional rule that applies to guilt phase). Ms. Boode is not entitled to the writ on her
5 Eighth Amendment claim.

6 E. A Certificate Of Appealability Will Issue As To Two Claims

7 Ms. Boode has "made a substantial showing of the denial of a constitutional right," 28 U.S.C.
8 § 2253(c)(2), and reasonable jurists would find debatable the district court's assessment of
9 petitioner's claims that (a) her right to due process was violated by the denial of a continuance and
10 (b) her right to be tried by an impartial jury was violated by the trial court's failure to dismiss Juror
11 No. 8. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a certificate of appealability
12 is GRANTED on those claims. The certificate of appealability is DENIED as to all the other claims
13 in the petition. Ms. Boode is cautioned that the court's ruling on the certificate of appealability does
14 not relieve her of the obligation to file a timely notice of appeal if she wishes to appeal.

15 VI. CONCLUSION

16 The petition for writ of habeas corpus is **DENIED** on the merits. The Clerk shall close the
17 file.

18
19 IT IS SO ORDERED.

20
21 Dated: May 1, 2015

22 
23 EDWARD M. CHEN
24 United States District Judge
25
26
27
28